Bail Slip:-

The petitioner/Accused herein Namely I. Mohan was directed to be released on bail in and by the order of this court dated 22.12.99 in CRL.MP.No.11046/99 on the file of High Court, Madras in CRL.A.No.1060/99.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

CRIMINAL APPEAL No.1060 of 1999

I.Mohan ... Appellant

Vs.

State, by
The Deputy Superintendent of Police,
Vigilance and Anti-corruption Wing
Special Cell, Krishnagiri.
(Cr.No.1/A.C./94 PT on the file of
the Vigilance and Anti-corruption Wing,
Erode.) ... Respondent

* * *

Criminal Appeal preferred under Section 374(2) Cr.P.C. as against the judgment of conviction and sentence dated 10.12.1999 rendered in Special C.C.No.14 of 1996 by the Special Court (I Additional District Court-cum-Chief Judicial Magistrate), Erode.

* * *

For appellant : Mr.C.P.Palanichamy for
M/s.A.Madhumathi
For respondent : Mr.J.C.Durairaj,
Govt.Advocate (crl.side)

* * *

JUDGMENT

The accused, having faced the trial for offences under the Prevention of Corruption Act, failed to succeed, resulting conviction, which is impugned in this appeal.

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2. One Nachimuthu was the Registered Contractor in P.W.D., where the accused, by name Mohan, was working as Sub Divisional Officer/Assistant Executive Engineer. After completion of the work regarding certain contract, the said Nachimuthu presented the bill for endorsement from the appellant, in order to realise the amount, as per the contract. The accused, on 7.2.1994, at about 6.30 p.m., demanded illegal gratification of Rs.3,000/= from the said Nachimuthu, thereby giving grievance to Nachimuthu. Therefore, the said Nachimuthu approached the respondent, who arranged trap, to book the accused/appellant, for receiving illegal gratification, which proved successful. Thus following the procedure, a final report came to be filed before the I Additional Sessions Judge-cum-chief Judicial Magistrate/Special Judge, Erode, seeking appropriate punishment under Sections 7 and 13(2) r/w.13(1)(d) of the Prevention of Corruption Act.

3. The learned trial Judge, perusing the materials, satisfying himself that there are sufficient materials, prima facie in nature, to frame charges against the accused, framed charges, questioned, for which, the accused refused to plead guilty, resulting trial, wherein 13 witnesses have been examined, seeking aid from 23 documents as well as nine material objects.

4. The evaluation of the above materials, brought to surface, unquestionably, in the assessment of the learned trial Judge, that the prosecution was successful, in bringing home the guilt of the accused under Sections 7 and 13(2) r/w.13(1)(d) of the Prevention of Corruption Act. Thus concluding, the learned trial Judge, convicted the accused for the offence under Section 7 of the Prevention of corruption Act and sentenced him to undergo Rigorous Imprisonment for six months and to pay a fine of Rs.1,000/=, in default to undergo further rigorous imprisonment for two months and for the offence under Section 13(2) r/w.13(1)(d) of the Prevention of Corruption Act, the accused was sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs.1,000/=, in default to undergo further rigorous imprisonment for two months, further ordering to run the sentences concurrently, which is impugned in this appeal.

5. The facts necessary to dispose of the case:

(i) The accused/appellant was working as Sub Divisional Officer/Assistant Executive Engineer, Public Works Department, Dharapuram Sub-division of Erode Division, as public servant. Thiru Nachimuttu, being a registered contractor in P.W.D., undertook some work and after completion, he presented the bill for counter-signature of the accused/appellant, prior to 7.2.1994.

(ii) The said Nachimuthu had borrowed the amounts from P.W.2-

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Thiru Karthikeyan, who requested him to repay the amount. Nachimuthu, awaiting the bill amount from P.W.D., promised P.W.2 to repay the amount after realisation of the bill amount and in pursuance of the same, P.W.2, accompanied by Nachimuthu, went to the house of the accused on 7.2.1994, in order to get the approval of the bill.

(iii) On seeing Nachimuthu, the accused demanded the amount and therefore, aggrieved by the same, with the help of P.W.2, Nachimuthu prepared Ex.P.2 complaint and subscribing his signature-Ex.P.3, he went to the Vigilance Department and met P.W.11 at about 11.00 a.m., then giving Ex.P.2. On that basis, a case came to be registered, for which Ex.P.18-printed FIR was prepared, submitted to the Court concerned.

(iv) Thereafter, P.W.11 arranged a trap proceeding, with the help of P.W.9, who was working as Deputy Superintendent of Police at that time. At the request of P.W.9, Nachimuthu produced Rs.3,000/= in denomination of Rs.100/= i.e. M.O.1. P.Ws.9 and 11, securing official witnesses viz. P.W.3 and another, explained the effect of Phenolphthalein and its reaction to Sodium Carbonate solution. In M.O.1 currency notes, coating Phenolphthalein and demonstrating how it should be given to the accused on demand, the amount was given to Nachimuthu. The procedure adopted was incorporated in the mahazar also.

(v) Thereafter, as directed by P.W.9, Nachimuthu and P.W.2 went to the house of the accused at about 6.45 p.m., on 8.2.1994. When the accused demanded the amount, Nachimuthu tendered Rs.3,000/= to the accused, which was accepted by him.

(vi) Thereafter, Nachimuthu, coming out of the house of the accused, gave signal to the Deputy Superintendent of Police (Vigilance), as directed, and watching the same, P.W.9 and others went to the house of the accused. Though P.Ws.3 and 9 and the persons accompanied them have seen the accused, sitting inside the house, the accused went to the bathroom and the call was answered by his wife. After the accused came out from the bathroom, P.W.9 requested about the money received by him from Nachimuthu. At the same time, preparing Sodium Carbonate solution, P.W.9 requested the accused to immerse his hands in the solution, which turned into pink colour, thereby indicating, he should have received the tainted currency, which was entrusted to Nachimuthu, by P.W.9. Thus concluding, when P.W.9 requested the whereabouts of the amount, he informed the availability of the amount in the bathroom, which was recovered under

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a mahazar. For recovery and for the other procedure adopted, documents were prepared, then accused was arrested.

(vii) Thereafter, following the other procedures and examining the other witnesses viz. P.Ws.5 to 8 regarding the tender process and the procedure adopted for encashing the bill, the Investigating Officer also obtained sanction from P.W.1, for prosecuting the accused, since he was working as a public servant.

(viii) The materials, so collected, revealed the fact, that in order to perform an official duty, the accused had received illegal gratification i.e. other than the legal remuneration and thus taking the view, a final report came to be filed, leading to trial, ending in conviction, which is impugned in this appeal.

6. Heard Mr.C.P.Palanichamy, learned counsel for the appellant and Mr.J.C.Durairaj, learned Government Advocate (crl.side) for the respondent/State.

7. The learned counsel appearing for the appellant, admitting the receipt of the amount from the defacto-complainant, though he has not been examined, would contend that the so-called tainted amount was received by him as small savings scheme amount, for which target was fixed by the Government; that the said amount is now labeled as illegal gratification falsely, in order to implicate the accused, as if he misconducted himself, being a public servant. No other defence has been raised before me. In support of the above said submissions, the learned counsel, inviting my attention to the decisions of this Court, as well as the Apex Court and taking me through the materials available on record, strenuously argued that the explanation, given by the accused, should be accepted, further urging that there is no such heavy duty cast upon the accused, to prove the defence beyond all reasonable doubts, whereas it is suffice, if probabilities are made out from which, an inference has to be drawn, as if the explanation must be correct. In aid, he also drew my attention to certain Rulings, which I will discuss infra.

8. The learned Government Advocate (criminal side), responding to the above submissions, would contend that though there was some circular, fixing the target regarding the collection of small savings amount, the Division, in which the accused was working, had achieved the target even before the date of incident and in this view, it should be held, the explanation, offered by the accused, must be incorrect. It is the further submission of the learned Government Advocate that the unquestionable materials, produced on behalf of the prosecution, have not only made out a case of acceptance of illegal

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gratification but also the demand and this being the position, the explanation is an afterthought, probably to escape from the clutches of law, which deserves rejection.

9. P.W.2, who accompanied the defacto-complainant, has spoken about the preparation of Ex.P.2, as well as giving the same to the Vigilance Department. But, as seen from the evidence, he has not fully supported the case of the prosecution, thereby received the seal of hostility. However, his evidence would indicate the preparation of Ex.P.2, which reached the hands of P.W.11 at 11.00 a.m., on which basis, a case also came to be registered under Ex.P.18, which also had reached the Court, without any delay, thereby avoiding the doubt that this document should have been prepared at later sage or something like that. It is also not the case before me that Ex.P.2 came into existence after the acceptance of the amount etc. Therefore, I should say, unhesitatingly, that Nachimuthu, when his right was infringed, had promptly lodged the complaint and in this view, there is nothing wrong in taking into consideration the averments available therein, though it may not be a substantial evidence, as such.

10. The Deputy Superintendent of Police, who has been examined as P.W.11, has categorically picturised and demonstrated, how the subsequent actions were taken by the Deputy Superintendent of Police, who has been examined as P.W.9. P.W.9 would state, on receipt of the copy of Ex.P.18, official witnesses viz. Venkatachalam (P.W.3) and Sadasivam were secured and they were introduced to Nachimuthu, in whose presence Rs.3,000/= viz. hundred rupee notes, numbering thirty, was handed over. He has further stated about the information furnished by him to the complainant as well as the witnesses, about the significance of coating Phenolphthalein powder and the reaction of Sodium Carbonate solution by immersing the hands of a person, who touched the Phenolphthalein powder etc. For that also, Ex.P.4 mahazar was prepared. Thereafter, as spoken to by P.W.9, the defacto-complainant, P.W.3 and another arrived nearby the house of the accused and he further spoke how P.W.3 and the defacto-complainant went to the house of the accused. The said evidence, adduced by P.W.3, also not under challenge. This witness has no axe to grind, being an official and responsible person, to say anything wrong or some thing untrue against another Government servant.

11. P.W.3 would state that when he and Nachimuthu had been to the house of the accused, at about 6.45 p.m., on 8.2.1994, they have seen him in the house, and then the accused questioned Nachimuthu about P.W.3, for which Nachimuthu introduced him as a financial partner. It is the further evidence of P.W.3 that thereafter, the accused requested him to be away. Then, the defacto-complainant and accused went near the gate, just about 15'

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away, where the accused questioned Nachimuthu, whether he brought the amount of Rs.3,000/=, which he had also. It is the further evidence from the mouth of P.W.3 that Nachimuthu had handed over M.O.1-Rs.3,000/= at about 7.30 p.m. and thereafter, both of them left the house of the accused and as instructed by P.W.9, Nachimuthu gave signal, then, immediately, police rushed to the scene. Thereafter, according to P.W.3, when they went to the house of the accused, it was bolted inside, but they were able to see the accused. Immediately, sensing some thing, it seems, the accused went inside and upon knocking the door, his son opened the door and his wife informed that her husband is inside the bathroom. According to P.Ws.3 and 9, waiting for five minutes or so, when the accused came out, he was subjected to Sodium Carbonate solution test, which proved positive, thereby proving he should have received the tainted amount. Then, according to him, on questioning, he accepted the demand, informing the amount is available in the bathroom.

12. It is also the further evidence of P.W.3, supported by P.W.9, that the amount was recovered, compared with the mahazar and thereafter, the pant worn by the accused, viz. M.O.8, was also subjected to Sodium Carbonate solution test, which proved positive, thereby making it clear that after the receipt of the amount from Nachimuthu, the accused should have put it in his pant pocket. The mahazar, prepared in the house of the accused, as seen from Ex.P.5, also makes it abundantly clear that the same was prepared in his house, not challenged at the time of the cross-examination also. Thus, the demand, as well as the acceptance of the amount by the accused and the recovery of the same from the bath room of the accused, in his residence, are proved beyond any reasonable doubt. Before me also, no argument was advanced, as if M.O.1 amount was not recovered from the house of the accused, whereas it was recovered from the office, where the accused was working. While considering the explanation offered by the accused, for accepting the amount, as well as for the recovery, the above facts should be remembered and that is why, despite the fact, no argument was advanced, questioning the evidence of P.Ws.3 and 9, I took the strain and analysing the evidence I have come to the conclusion that the amount was given to the accused in his house, where from alone, that too in the bath room, the amount was recovered.

13. In STATE OF TAMIL NADU vs. S.KRISHNAMURTHY [2002(4) CRIMES 295 (SC)], the Apex Court has considered the explanation offered by the accused in a similar case of this nature, involving an offence under Section 13(2) r/w.13(1)(d)(ii) of the Prevention of Corruption Act. In the case involved in the above decision, the defence was, the accused did receive the money, but the same was received, not as bribe, but as donation for Teachers Day,

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which was accepted by the High Court. In the case involved in the above decision, immediately after the payment, the complaint was not given, and there was a delay of few days before approaching the ante-corruption authorities. It was also elicited therein from the defacto-complainant, that on one of his earlier visits, on demand, he paid a sum of Rs.100/= towards the donation for Teachers Day. Thus, the practice was established about the collection of money by the accused for Flag Day, for which, receipts would also be issued immediately or at a later point of time. Considering the inordinate delay, as well as the procedure established, the Apex Court has observed that the explanation offered by the accused therein that he did receive the amount, but not as bribe, is well proved, which dictum cannot be extended to the case on hand, since it is purely based upon facts, since in the case on hand, such kind of practice viz. receiving the amount, in cash, that too, in the house, were not established.

14. In PUNJABRAO vs. STATE OF MAHARASHTRA (2004 SCC (Cri) 1130), the Apex Court has considered the onus upon the accused, to prove the defence and it is observed:

> "The accused can establish his defence by preponderance of probability and if the explanation offered is found to be reasonable, that cannot be thrown away merely on the ground that he did not offer the explanation at the time when the amount was seized."

Thus, the explanation offered by the accused in that case was found reasonable, considering the evidence available therein. If that factual position is available, there could be no quarrel in applying the above principles to the case and not otherwise.

15. In DURAISAMI vs. STATE OF T.N. (2005 SCC (Cri) 1508), the accused who sustained the conviction, challenged the same before the Apex Court, wherein also, the accused/appellant admitted that he had received the amount, but contended that the said amount was received as balance payment for two Indira Vikas Patra certificates sold by him to the prosecution witness. In aid, reliance was also placed upon a communication, reflecting the same, probably even prior to the incident, giving the numbers of the Indira Vikas Patra certificates in that communication. Therefore, as seen from the judgment of the Apex Court, a decision was taken, that the explanation offered by the accused was sufficient in nature and the same cannot be taken, as if an explanation offered to escape from the illegal act committed by the public servant.

16. By going through the materials available in this case before me, I find no such preponderance of probabilities, compelling me to draw an inference, as if the accused/appellant would have received a sum of Rs.3,000/=, in order to achieve the small savings target fixed by the Government from the defacto-

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complainant, who was a registered contractor in the Public Works Department. Considering the bill amount, as well as the amount said to have been received by the accused for the purpose of purchasing small savings certificate, also appears to be disproportionate, thereby negativing the explanation, to some extent. As seen from Ex.P.9 and as spoken to by P.W.7, the then cashier, the bill amount was only Rs.13,682.22. When the contractor approached for the counter signature of this bill or the approval of the accused, if he had demanded Rs.3,000/= for purchasing small savings certificates, in my considered opinion, it may not amount to proportionate to the bill amount and viewing the case from this angle also, it should be construed that preponderance of probabilities may be lacking in this case. In this view, applying the ratio laid down by the Apex Court in the above quoted judgment may not be proper as well as it is not desirable also.

17. In an unreported judgment delivered in Crl.A.No.927 of 1999, dated 10.8.2006 (M.K.SHENMUGHASUNDARAM vs. THE INSPECTOR OF POLICE, VIGILANCE AND ANTI CORRUPTION, SALEM), while considering the defence of a Village Administrative Officer, this Court accepted the explanation offered by the accused and gave the relief to the accused and the same view was taken previously also, as seen from a decision of this Court in SUNDARA KRISHNAN vs. STATE, REP.BY THE INSPECTOR OF POLICE, VIGILANCE AND ANTI CORRUPTION, CUDDALORE (1998-2-L.W.(Crl.) 718), as if the accused had offered proper explanation to the satisfaction of the Court, in a convincing manner.

18. Section 20 of the Prevention of Corruption Act contemplates certain kind of presumption upon certain proved facts viz. that the accused person has accepted or obtained any gratification i.e. other than legal remuneration, then it shall be presumed, until the contrary is proved, that he accepted the amount as a motive or reward, as mentioned in Section 7 of the Prevention of Corruption Act. In this case, even as per the admitted case of the accused/appellant, he received the amount, which is also proved, which is certainly not the legal remuneration of the accused. Therefore, the presumption also comes to the aid of the prosecution, since the offence reported against the accused/appellant is also under Section 7 of the Prevention of Corruption Act. Despite this fact, the learned counsel for the appellant drew my attention to a decision of the Apex Court in UNION OF INDIA THROUGH INSPECTOR, CBI vs. PURNANDU BISWAS [(2006) 1 SCC (Cri) 520], urging that presumption under Section 20 of the Act is not available to the prosecution. Applying my mind carefully and giving thoughtful consideration and by going through the entire judgment, I am unable to accept the argument of the learned counsel for the appellant, since factually

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as well as legally, the subject involved in the case quoted above, as well as the case on hand is different.

19. The presumption under section 20 of the Prevention of Corruption Act is available, where the accused is charged under Section 7 or Section 11 or clause (a) or clause (b) of Sub-section (1) of Section 13, which we are concerned at present. Thus, it is seen, if the accused is charged under any other provisions of the Act, probably Section 20(1) may not be applicable and I think this is the dictum of the Apex Court. In the case involved in the above decision, though the demand of illegal gratification by the respondent has not been proved, it seems, the aid of Section 20 was sought for. The Apex Court, considering the scope of Section 20 and its non-applicability to Section 13(1)(d) of the Act, has come to the conclusion that the presumption is not available, which could be seen from paragraph 36 of the judgment, which reads:

> "In this case, demand of illegal gratification by the respondent has not been proved. Furthermore, Section 20 of the Act is not attracted as the respondent had been charged for commission of an offence under Section 13(1)(d) read with Section 13(2) of the Act."

20. Here, the accused is not only charged under Section 13(2) r/w.13(1)(d), but also under Section 7 of the Prevention of Corruption Act, which is well covered under Section 20 of the Prevention of Corruption Act. In this view, if at all, it can be said, the presumption may not be available for the offence under Section 13(1)(d) r/w.13(2) and Section 7 cannot be taken away, since in this case, the gratification is proved and for the reasons, which I am going to record hereunder also, contrary is not proved, though the presumption is rebuttable and not absolute one.

21. The law is well settled that the accused is not bound to prove his innocence by adducing unimpeachable evidence or unquestionable evidence, as required to prove the offence, whereas even where a presumption is contemplated against the accused, as held by the Apex Court in M.S.NARAYANA MENON @ MANI vs. STATE OF KERALA AND ANOTHER (2006 (3) CTC 730), 'onus of accused in criminal case is not as heavy as that of prosecution and he may be compared with defendant in civil case', making out preponderance of probabilities, not only by adducing evidence by himself, if he desires or exposing the probabilities available in the evidence of the prosecution witnesses itself. Therefore, I am not going to say, since the accused has not examined himself or he has not examined any witnesses, automatically, the presumption should drive him behind the bars and it is the duty of the Court to scan the materials to find out the preponderance of probabilities, so

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as to say, whether it has the power and capacity to rebut the presumption, contemplated under Section 20 of the Prevention of Corruption Act.

22. As seen from the cross-examination of P.Ws.3 and 9, there is only total denial about the procedure adopted by the respondent in conducting the trap. A suggestion was thrown to P.W.9, as if Nachimuthu paid a sum of Rs.3,000/= on 8.2.1994 at about 6.00 p.m. in the office and at that time, the then Inspector Thiru Moorthy (P.W.11), took him, as if his presence is required for an enquiry, where the documents are prepared. The said suggestion is not supported by any materials. As I have already adverted to above, it is unquestionably, I should say so, proved that Nachimuthu had paid the amount to the accused in his house and the amount also has been recovered only from the bathroom of the house of the accused that too, at the instance of the accused. The pant pocket of the accused also proved positive when it was subjected to Sodium Carbonate solution test. I do not find any reason to discard those materials and to prefer the suggestion thrown to P.W.9, as if the amount was given by Nachimuthu in the office. If that is so, nothing would have prevented the accused from examining any staff, who might have been present at the time of the accused receiving the amount, since it is not a secret one, the further fact being there was target for collection of the small savings amount, recognised by the Government also. The improbability available in the defence and the fact proved, that the amount was recovered from the house of the accused, would suggest, without any shadow of doubt, that the accused should have received the amount, as illegal gratification, probably to favour the bill and not as small savings amount in cash, which is also prohibited as per the evidence given by P.W.6, not challenged.

23. As deposed by P.W.4 and as seen from Ex.P.11, target was fixed for the collection of small savings amount. It is the further case of P.W.4 that as per the communication sent by the accused under Ex.P.12, he had reached the target even in the month of January, 1994. It is also in evidence that the officers are not permitted to collect the amount in cash and if at all, they have to insist the person, who is willing to contribute for the purpose of the small savings certificate, to get the certificates purchased, probably endorsing that canvassing was made by the official concerned, so as to say that the person, who was directed by the Government to achieve the target had reached the same. Since collection of the amount i.e. in cash is prohibited, it may be available in some cases like flag day, for which receipts should have to be issued by the officials, I am unable to accept the explanation offered by the accused.

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24. If the amount had been recovered from the office, there may be a chance to accept the explanation offered by the accused, which is not the case here. The complaint also reads that the demand was made in the house itself on the previous day and pursuant to the same, the complainant and P.W.2 had been to the house of accused, thereby showing the amount collected by the accused must be the illegal gratification and that amount cannot be taken away as one collected by the accused for the purpose of purchasing small savings certificate in the name of the complainant, showing the accused as the canvassing agent etc.

25. Considering all the above facts and circumstances including other attending circumstances of the case, it is very very difficult to accept the explanation offered by the accused, though in the quoted judgments above, when materials are available, the Courts have accepted the explanation, which is not the case herein. Except the explanation offered, no other defence was raised or argued before me, questioning the case of the prosecution, including the sanction etc. The trial Court, considering elaborately about the prosecution case, has come to the conclusion, irresistibly, that a case has been made out against the accused for the offences under Sections 7 and 13(2) r/w.13(1)(d) of the Prevention of Corruption Act, which requires only approval not disturbance, thereby showing the appeal is devoid of merits.

26. In the result, the appeal is dismissed, confirming the conviction and sentence passed against the appellant/accused in Special C.C.No.14 of 1996 by the Special Court (I Additional District Court-cum-Chief Judicial Magistrate), Erode, dated 10.12.1999.

The sentence imposed on the appellant was suspended by this Court as per the order dated 22.11.1999 made in Crl.M.P.No.11046 of 1999. Therefore, the appellant, who is on bail, is directed to surrender before the Court concerned, to serve out the remaining period of sentence within 15 days, failing which the trial Court is directed to take appropriate steps for securing the appellant/accused, to serve out the remaining period of sentence. The appellant is entitled for set-off under Section 428 Cr.P.C.

Rao

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1.The Special Court (I Additional District Court), cum Chief Judicial Magistrate, Erode.

2.The Deputy Superintendent of Police,
Vigilance and Anti-corruption Wing
Special Cell, Krishnagiri.

3.The Public Prosecutor,
High Court, Madras.

4.The Deputy Superintendent of Police,
Vigilance and Anti-corruption Wing
Erode.

+ 1 cc to M/s. A. Madhumathi, Advocate SR No. 63153

Judgment in Crl.A.No.1060/1999

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